Supreme Court, U.S.
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No. 06-1466

IN THE

Supreme Court of the United States

DANNY T. BARNES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

A. The Question Presented Is Important and Recurring. 2

B. The Government's Interpretation of DOPMA Wrongly Subjects Thousands of Military Officers to Unwarranted Promotion Denials and Delays. 4

C. The Court Can Reach the Statutory and Constitutional Issue in this Case. 8

CONCLUSION 10

REPLY APPENDIX 1ra

TABLE OF AUTHORITIES

Page

CASES

Barnhart v. Peabody Coal Co.,
537 U.S. 149 (2003) 7

Dysart v. United States,
369 F.3d 1303 (Fed. Cir. 2004) 1, 2

Hamdan v. Rumsfeld,
126 S. Ct. 2749 (2006) 9

HUD v. Rucker,
535 U.S. 125 (2002) 4

Imperial Cas. & Indem. Co. v. Chicago Housing Auth.,
987 F.2d 459 (7th Cir. 1993) 10

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 1, 8

Miller v. French,
530 U.S. 327 (2000) 4

Regions Hosp. v. Shalala,
522 U.S. 448 (1998) 7

SMS Data Prods. Group, Inc. v. United States,
853 F.2d 1547 (Fed. Cir. 1988) 10

United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.,
484 U.S. 365 (1988) 7

United States v. Locke,
471 U.S. 84 (1985) 4

Weiss v. United States,
510 U.S. 163 (1994) 5

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. art. II, § 2, cl. 2 ..... 1, 5

STATUTES

10 U.S.C. § 611 1
10 U.S.C. § 618 4
10 U.S.C. § 624 ..... *passim*
10 U.S.C. § 629 4
10 U.S.C. § 741 4
10 U.S.C. § 1552 2
94 Stat. 2858 6

OTHER AUTHORITIES

H.R. Rep. No. 97-141 (1981) 6
S. Rep. No. 109-254 (2006) 3
Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002) 3
Webster's Third New Int'l Dictionary (1961) 9

REPLY BRIEF FOR PETITIONER

The Government insists that the Defense Officer Personnel Management Act ("DOPMA"), 10 U.S.C. § 611 *et seq.*, requires the President, following Senate confirmation, to issue letters of appointment or take some other unspecified step in order to effectuate the appointment of promoted military officers. But nothing in DOPMA requires or even contemplates such presidential action. The single provision the Government invokes does not remotely support its position. And even if it did, other provisions the Government ignores conclusively disprove the Government's contention. Section 624(a)(2) could not be clearer: Officers who have been nominated by the President and confirmed by the Senate for promotion "shall be" appointed *unless* they are given statutorily sufficient notice that their promotions are delayed and are then removed from the promotion list within the statutorily-prescribed time period. There is no plausible textual basis, therefore, for avoiding consideration of whether DOPMA violates *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and the Appointments Clause, U.S. Const. art. II, § 2, cl. 2.

That pure question of law warrants review. The Government agrees that the Federal Circuit is the only court that will face the issue and that it has conclusively resolved the question. When considered with *Dysart v. United States*, 369 F.3d 1303 (Fed. Cir. 2004), the decision below therefore effectively creates a nationwide rule. Absent review, it will subject countless military officers to unwarranted denials or delays of promotion. This result is precisely what Congress sought to avoid by enacting DOPMA, which was designed to bring certainty and efficiency to a process that affects thousands of military officers every year. The fact that no other circuit will interpret DOPMA's delay provisions or consider the important statutory and constitutional issues raised here demonstrates the necessity of this Court's review.

A petition raising the same Question Presented here is already pending before the Court. *See Lewis v. United States*, No. 06-1289. Petitioner respectfully requests that this Court grant both his petition and *Lewis*, and consolidate the cases for argument.

A. The Question Presented Is Important and Recurring.

The Federal Circuit has correctly acknowledged that the interpretation of DOPMA's delay provisions raises "*significant questions* concerning the appointment process for military officers." *Dysart*, 369 F.3d at 1306 (emphasis added). Nevertheless, the Government contends that the Court should deny review because the question is not recurring and therefore is of limited prospective importance. This argument is without merit.

1. Although the Government acknowledges that "thousands of military promotions are made annually under DOPMA," Opp. at 17, it claims that the Question Presented is not recurring because only a handful of reported cases—including *Lewis*—have addressed DOPMA's delay provision, 10 U.S.C. § 624(d). But reported cases are not even close to the best indicator of the frequency with which the Question Presented arises. The vast majority of military personnel issues are adjudicated by record correction boards created by 10 U.S.C. § 1552, and never reach the courts because the affected service-member lacks the financial resources needed for litigation. As a practical matter, it is impossible for anyone outside the Government to know precisely how many section 624(d) cases have come before—or are currently pending in—the correction boards. But the bipartisan congressional correspondence reproduced as an appendix to this reply shows that violations of section 624(d) are by no means a rarity. Reply App. 1ra-3ra. Considering the sheer number of officers who undergo the promotion process each year, that correspondence suggests that the re-

ported cases to which the Government has restricted itself in seeking to minimize the scope of the problem are only the tip of the iceberg.

2. The Government does not dispute that the Federal Circuit has addressed the issue and that no other court of appeals will have the opportunity to interpret DOPMA's delay provisions because claims like Mr. Barnes's are litigated exclusively in the Federal Circuit. The Federal Circuit's flawed interpretation thus creates a *de facto* nationwide rule regarding DOPMA's meaning. This Court routinely grants review in patent cases from the Federal Circuit, where "conflict among and with other federal courts . . . has been virtually eliminated," based "largely on the importance of the questions presented." Robert L. Stern et al., *Supreme Court Practice* 263 (8th ed. 2002). The same result is warranted in this case. Absent review and correction here, the decision below will continue to subject the officer corps of all of the military services—including the thousands of officers who are promoted each year—to uncertainty that Congress not only never intended but in fact affirmatively sought to prevent.[1]

The Government also glosses over the Federal Circuit's essential constitutional holding in *Dysart* (reaffirmed in *Lewis* and the decision below) concerning *Marbury* and the Appointments Clause. Like the Court of Appeals, the Government does not grapple with whether Congress may vary

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[1] The legislative history of recent amendments to DOPMA confirms that uncertainty in the promotion process is unacceptable. *See* S. Rep. No. 109-254, at 316 (2006) ("Relegation of any officer to a . . . 'limbo' status serves the interest of neither the individual officer nor the officer corps."); *see also Lewis* Reply at 3 n.2 (explaining that these amendments do not change the analysis here).

in any way the manner in which the required steps in the appointments process take place.[2]

B. The Government's Interpretation of DOPMA Wrongly Subjects Thousands of Military Officers to Unwarranted Promotion Denials and Delays.

The Government's reading of DOPMA suffers from the same flaws as the Federal Circuit's interpretation. DOPMA plainly provides that an officer nominated for promotion by the President, 10 U.S.C. §§ 618(c)(1), 629(b), considered and confirmed for that office by the Senate, *id.* § 629(b), and assigned a projected promotion date by a service secretary, *id.* §§ 624(b), 741(d), is appointed on his projected promotion date absent statutorily sufficient notice that his appointment will be delayed. *Id.* § 624(d)(3). Such notice must be given prior to the officer's projected promotion date and, absent notice, the officer will be promoted on that date unless giving prior notice is impracticable. *Id.*

Despite this clear statutory scheme—which sets forth the role of both the Executive and Legislative branches in the appointments process and delineates clear mechanisms and

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[2] Instead, the Government falls back on the avoidance canon, suggesting that review is unwarranted because the lower court's interpretation of DOPMA avoids any constitutional issues. Opp. at 16. That canon, however, is not applicable where, as here, the Court would have to ignore clear statutory language and congressional intent, adopt an implausible reading of a statute, or write language out of a statute. *See, e.g.*, *HUD v. Rucker*, 535 U.S. 125, 134-35 (2002) (error to apply canon where meaning of statute is clear); *Miller v. French*, 530 U.S. 327, 337 (2000) (rejecting construction that would avoid difficult separation of powers questions when that construction was implausible and would have subverted plain meaning of statute); *United States v. Locke*, 471 U.S. 84, 95-96 (1985) (rejecting argument that deadline should be read out of statute to avoid due process issue because "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted") (internal quotation marks omitted). The Government asks the Court to do all three.

timeframes for Executive action—the Government argues that the President has unlimited discretion to delay military appointments. *E.g.*, Opp. at 15. It relies almost exclusively on section 624(c), which provides that:

> Appointments made under this section shall be made by the President, by and with the advice and consent of the Senate, *except that* appointments under this section in the grade of first lieutenant or captain, in the case of officers of the Army, Air Force, or Marine Corps, or lieutenant (junior grade) or lieutenant, in the case of officers of the Navy, shall be made by the President alone.

(Emphasis added.)

According to the Government, section 624(c) requires some presidential action beyond section 624(a)'s requirement that the President approve the list of officers recommended for nomination by the selection board. Opp. at 13. But section 624(c) requires nothing of the kind. On the contrary, because most military officers are "inferior officers" within the meaning of the Appointments Clause, *see Weiss v. United States*, 510 U.S. 163, 182 (1994) (Souter, J., concurring), for whom Congress has the power to vary the appointments process, section 624(c) simply clarifies that certain lower-grade officers are exempt from the advice and consent requirement. *See* U.S. Const. art. II, § 2, cl. 2 ("[T]he Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."). This exemption from Senate confirmation does not remotely support the Government's view about what kind of presidential action is required to effectuate an appointment, but it is the only provision the Government cites to support its position.

Moreover, even if section 624(c) otherwise supported the Government's view, other provisions of the statute noted below undercut that view. Under the Government's view, the default rule for confirmed officers would be that they would not be appointed absent some additional Executive act following Senate confirmation. But the delay provisions would make no sense if that were the statute's meaning. For example, the provision requiring notice of a delay prior to an officer's projected promotion date would be completely unnecessary if an officer would not expect to be appointed on that date unless otherwise notified in advance.[3] The default contemplated by the statutory scheme is plainly that an officer will be appointed on his or her projected promotion date.[4]

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[3] The Government turns the notice provision on its head, stating that it "expressly sanctions the provision of a notice delay *after* the projected promotion date," which "would make little sense if Congress believed that automatic appointment occurs on the projected promotion date." Opp. at 15 (emphasis in original). Precisely the opposite is true. DOPMA was amended in 1981 to add an impracticability *exception* to the prior language, which simply provided that an appointment could "not be delayed unless the officer ha[d] been given written notice of the delay." 94 Stat. 2858. The legislative history confirms that the impracticability language was added to respond to the possibility that, under the original version, an officer might have been promoted simply because notice of a delay had not been transmitted to him or her in a timely fashion. *See* H.R. Rep. No. 97-141 at 14 (1981) ("This amendment recognizes that information calling into question the qualifications of an officer for promotion may be revealed only shortly before the projected date of the promotion and that, in such cases, the officer may not be reasonably available (e.g., on a weekend, while on leave or while absent without leave) to receive written notice that the promotion is being delayed."). The Government's attempt to turn the impracticability exception into some sort of general rule allowing notice after a projected promotion date is nonsensical. There would have been no need for Congress to add this exception if an officer would not otherwise be promoted on his or her projected promotion date.

[4] The Government further argues that a "coercive sanction" cannot be imposed by the courts if a statute does not specify a consequence for non-compliance with timing provisions. Opp. at 14. This is unpersua-

At a minimum, the Government reads the following provisions entirely out of DOPMA: (1) section 624(a)(2) ("officers on a promotion list . . . shall be promoted" except as provided in the delay provisions); (2) section 624(d)(1) ("the appointment of an officer under this section may be delayed" due to pending disciplinary or other proceedings); (3) section 624(d)(2) (providing additional grounds for delay and setting forth procedures for the promotion of delayed officers who are ultimately retained on the promotion list); (4) section 624(d)(3) ("[t]he appointment of an officer may not be delayed" without written notice "unless it is impracticable to give such written notice before the effective date of the appointment"); and (5) section 624(d)(4) (prescribing time limits for promotion delays).

Because the Government's solitary focus on section 624(c) ignores the fact that DOPMA's other provisions clearly provide that an officer is "appointed" following Senate confirmation *unless* the officer is properly notified of a delay and the President then takes affirmative action to remove the officer's name from the promotion list within the statutorily-prescribed period, the Government violates the principle that statutory construction "is a holistic endeavor." *See, e.g., United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

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sive. Appointment of an officer nominated by the President and confirmed by the Senate is in no sense a "sanction." Promotion under DOPMA occurs by operation of the statute, and a court upholding such a promotion is merely recognizing the result Congress guaranteed in passing this legislation. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003), and *Regions Hospital v. Shalala*, 522 U.S. 448, 459 n.3 (1998), on which the Government relies, are inapposite because the courts in those cases were imposing the restrictions on agency behavior themselves, rather than applying a law that specified the appropriate result.

The constitutional concerns driving the Government's reading of DOPMA are equally misplaced. When it enacted DOPMA, Congress neither enlarged its own appointment power nor impermissibly infringed on the Executive's appointment power. Similarly, DOPMA does not violate *Marbury*, as that case does not mandate that the requisite steps in the appointments process take place in any particular order. Rather, *Marbury* makes clear that appointment occurs "when it is shewn that [the President] has done every thing to be performed by him." 5 U.S. at 157. As explained in the petition, when the President nominates an officer for promotion, he does so with the understanding that the officer will be appointed after Senate confirmation absent some Executive action to delay the appointment and remove the officer's name from the promotion list during the statutorily-defined period. Pet. at 24. Thus, the showing that *Marbury* requires—that the President has done all that is required of him—is made when the President nominates an officer and then chooses not to take subsequent action that complies with statutory procedures to delay or prevent the promotion.[5] *See also id.* The Government does not explain why *Marbury* creates an inflexible rule governing all appointments over *two centuries* later and thus barring an efficient, modern military appointments process, and that question merits review.

C. The Court Can Reach the Statutory and Constitutional Issue in this Case.

Contrary to the Government's assertions, the Federal Circuit's holding that it was impracticable to provide Mr. Barnes with timely notice of his promotion delay simply be-

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[5] The Government's insistence that a letter of appointment or some comparable document must be delivered to an officer to effectuate his or her promotion is unfounded. The Government points to no provision in DOPMA that requires such an additional Executive act, and it therefore cannot be the "last act" necessary to effectuate an appointment unless *Marbury* requires it. The important question of what *Marbury* requires is thus squarely raised here.

cause he was at sea does not pose a fact-intensive question barring this Court's review. Notice of Mr. Barnes's promotion delay was sent to his base even though he was at sea; he was reachable aboard the USS *John S. McCain* by a variety of means, including e-mail, fax, telephone, and electronic message, and received e-mails while on the ship both before and after his projected promotion date; *over a week after* his projected promotion date, an officer at his base informed the Bureau of Naval Personnel that he did not want to mail the delay documents to Mr. Barnes while he was at sea;[6] *two weeks after* his projected promotion date, Mr. Barnes received an e-mail aboard the *McCain* informing him of his promotion delay; and *three weeks after* his projected promotion date, he was given the memorandum regarding his promotion delay. Pet. at 10-12; Opp. at 5. None of these facts is disputed.

In this day and age, it is meritless to argue that the Navy could not have ascertained that Mr. Barnes was at sea and sent the notice to his ship rather than to his base. He was reachable while aboard the *McCain*, and it defies explanation why the e-mail informing him of his promotion delay was not sent to him until *two weeks after* his projected promotion date rather than before that date.[7] Because the underlying

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[6] The Government suggests that deference should be given to this "determination." Opp. at 10-11. But the officer did not make any determination regarding giving Mr. Barnes notice until after his projected promotion date had passed. Pet. at 11. Moreover, DOPMA requires an inquiry into whether notice was practicable, not into whether an officer subjectively considered notice to be practicable. As this Court has noted, determinations as to whether something is practicable, rather than as to whether something is considered practicable, are entitled to reduced, if any, deference. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2792 & n.51 (2006); *see also id.* at 2801 (Kennedy, J., concurring); Pet. at 26 n.18.

[7] The Government contends that Mr. Barnes has equated impracticability with impossibility. Opp. at 10. But Mr. Barnes does not dispute the Government's definition, namely that something is impracticable if it is "incapable of being performed or accomplished by the means em-

facts are not disputed, the Federal Circuit's impracticability determination is a legal conclusion subject to *de novo* review. *E.g.*, *Imperial Cas. & Indem. Co. v. Chicago Housing Auth.*, 987 F.2d 459, 461 (7th Cir. 1993); *see also SMS Data Prods. Group, Inc. v. United States*, 853 F.2d 1547, 1553-54 (Fed. Cir. 1988). This Court can easily address this question, and the Federal Circuit's cursory holding on the issue should not insulate that court's incorrect decision from review.[8]

Finally, the Government argues that the Court should not grant the petition because Mr. Barnes is not qualified for promotion. Opp. at 17. But even the Government does not contend that Mr. Barnes's substantive qualifications are relevant to the Question Presented. The issue is what DOPMA means and whether the Government violated it here. That question warrants review.

CONCLUSION

For the foregoing reasons and those previously stated, the petition should be granted.

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ployed *or at command*: infeasible." *Webster's Third New Int'l Dictionary* 1136 (1961) (emphasis added) (cited in Opp. at 10). Here, the Executive clearly had tools at its command to inform Mr. Barnes of the delay in a timely fashion; notice was not infeasible.

[8] The Federal Circuit's alternative holding that any defect in the notice Mr. Barnes received was harmless assumes the correctness of the Federal Circuit's interpretation of DOPMA. If DOPMA has the meaning Mr. Barnes attributes to it, the error cannot be harmless because Mr. Barnes would have been promoted on his projected promotion date.

Respectfully submitted,

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August 14, 2007

REPLY APPENDIX

COMMITTEE ON ARMED SERVICES
U.S. House of Representatives
Washington, DC 20515-6035
ONE HUNDRED EIGHTH CONGRESS

February 25, 2004

Honorable David S. C. Chu
Under Secretary of Defense
Personnel and Readiness
Pentagon 3E764
Washington, DC 20301-4000

Dear Secretary Chu:

We have become aware of a significant problem in the way that the Department of the Navy, as well as the Office of the Secretary of Defense, is handling the review of the cases of officers whose promotions have been delayed in accordance with sections 624(d) and 14311(d) of title 10, United States Code. These sections permit the delay in the promotion of officers to resolve matters that may have arisen or been discovered following the officer's selection by a promotion board. However, the statutes set a maximum delay in the promotion of such officers at 18 months from the date that the officer would have normally been promoted.

Subcommittee staff discussions with the Navy have identified a total of 33 Navy cases in which promotions have been delayed for significant periods beyond the 18-month statutory limit. For example, the promotion of one Naval

Reserve officer has been delayed since November 1, 1998 — a delay of 64 months, which is more than four years beyond the limit allowed by law. In another case, an active duty Navy officer's promotion has been delayed since May 23, 1999 — a delay of 57 months, which is more than three years beyond the limit in statute. All the other cases the subcommittee staff reviewed involve promotions that have been delayed since 2000 through 2002.

We understand that the Navy has begun a process to expeditiously resolve the cases of delayed promotions involving active duty Navy officers and to institute a system to prevent inordinate delays in the future. However, the cases involving the delayed promotions of Naval Reserve officers require that your office turn its attention to more quickly obtaining decisions on those cases which, under current procedures, may ultimately require a decision by the President.

The attached list of delayed promotions for Naval Reserve officers illustrates that inordinate delays are experienced at all levels of the chain — from the Department of the Navy through the Office of the Secretary of Defense — through which these actions must tortuously pass.

The negative impact on the officers concerned of these largely administrative delays is unwarranted. We understand that most of the officers are eventually promoted and the system does provide for the payment of lost pay. However, extended delays in promotion result in the officers losing competitiveness with their contemporaries, which ultimately means lost or degraded opportunity for future promotion.

We request that you expeditiously resolve the Naval Reserve cases on this list. Furthermore, because we believe that the problems being experienced by the Navy may also be evident in the other military departments, we ask you

undertake a review of the process and identify reforms necessary to ensure that the processing of delayed promotions for active and reserve officers in all the military departments does not exceed the statutory limit of 18 months.

We look forward to hearing from you on the results of your review and about your prescription for corrective action. As always, if there are specific actions that the subcommittee might take to assist you, we would be happy to entertain your recommendations.

Sincerely,

s/_____
John M. McHugh
Chairman
Subcommittee on Total Force

s/_____
Vic Snyder
Ranking Member
Subcommittee on Total Force

JM/VS:jdc
Enclosures